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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIM, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

-vs-

ESSIE B. BURNEY,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

REPLY BRIEF

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Deputy Attorney General
Attorneys for Appellants

Offices of the Attorney General
Room 219—State House
Indianapolis, Indiana 46204
Telephone: 317-633-6420

C. E. Pauley & Co., Inc., Indianapolis

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REPLY BRIEF

STATEMENT OF THE CASE

The Statement of the case in the Brief of Appellants is accurate and reasonable. However, the Statement of the case in the Brief of Appellee is rejected in that it is argumentative and contains a number of inaccuracies.

STATE LAW AND PROCEDURE

It would appear that the major question in dispute in this case is not one of federal statutory or constitutional law, but rather the procedures used by the Division under Indiana law. The point in issue is whether eligibility is

determined weekly or whether an initial determination of eligibility is made which continues in effect over some future period. It is quite clear that eligibility is determined on a weekly basis.

Indiana law distinguishes between an initial determination of "insured status" and determinations of eligibility. In practice, those eligibility determinations are also spoken of as "initial" and "continued" claims. These terms must be considered.

The first determination is whether a claimant is an "insured worker." Indiana Code of 1971, 22-4-17-2(a), set out in the Brief of Appellants at p. A-1. An "insured worker" is one who has earned the required amount of wage credits. Indiana Code of 1971, 22-4-2-25. Such a determination is necessary because the unemployment compensation system is based in part on an insurance principle.

Section 22-4-17-2 does require calculation, as part of this determination, of "the maximum amount of benefits that may be paid to him for weeks in his benefit period." The practice is to calculate that amount into weekly benefits amounts and duration. *Unemployment Compensation Claims Manual*, § 13100. Such determination, though, establishes no right to benefits any more than the payment of a premium on a term life insurance policy allows the insured to collect the face value of the policy the next day. There are conditions precedent to payment. In the life insurance example, that condition is the death of the insured. The conditions in unemployment compensation are less drastic but more complex.

Those conditions fall into two categories. One relates to the circumstances of termination of the prior employment. Those circumstances being a matter of past action at a specified point in time, they ordinarily need be determined

only once, after which a *res judicata* status is accorded the determination. Cf. *Torres v. New York Department of Labor,* 321 F.Supp. 432 (D.C.S.D.N.Y. 1971). That category is not in issue in this case. Nor can determination of that question be determinative of eligibility, since a claimant has at that point fulfilled only part of the conditions precedent.

The second category deals with the claimant's activities during the period. Examples are found in Indiana Code of 1971, 22-4-14-3:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

These issues, which are just as much conditions precedent as are the others, are also questions of fact and therefore can only be determined after the event. No human agency can accurately predict on December 1 whether a person then unemployed will meet these standards the next March 1. By that time, the person might be employed, ill, dead or otherwise no longer in the labor market. That agency will also be unable to determine in December whether the claimant might not refuse an offer of suitable work or otherwise disqualify himself in February. The law requires, therefore, that:

> "In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period, determine the claimant's eligibility with respect to each week . . ." Indiana Code of 1971, 22-4-17-2(d).

That determination is made weekly by one of two methods. Periodically, a full in-depth interview with a claims deputy will be scheduled. *Manual,* §§ 13725, 13731,

13732. In other weeks a more summary method is followed. The claimant is required to sign a printed statement that he has met all of the eligibility conditions. The claims-taker will ask certain questions and explore any obvious question of eligibility. *Manual*, § 13620, set out in full in the Appendix to the Appellants' Reply to Appellee's Motion to Affirm. Under either procedure, a voucher is executed at that time which is then used to process the payment of benefits. *Manual*, §§ 13600, 13660, 13661, 13670.

It is thus clear both as a matter of law and of fact that a new determination of eligibility is made each week which is effective only for that week. An initial determination of insured status does not foretell the future. Nor does a determination for one week determine eligibility for more than that week. A number of statements in the Brief of Appellee on these matters are submitted to be inaccurate.

COMPLIANCE WITH THE SOCIAL SECURITY ACT

At this point, the issues of the case can be considered. Little comment is needed beyond what was argued in the Brief of Appellant as to the statutory issues.

The first such issue is whether payment is made "when due." The simple fact is that there is never any determination in such a case that would make payment due. The only determination by the Division which affects that week is that no payment is due.

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, — U.S. —, 92 S.Ct. 2701, 2709 (1972).

Since the only determination made was adverse to him, the claimant has nothing on which to base his claim for payment pending a full hearing. The situation is in effect

a disallowance of an initial claim, in which case no right to immediate payment exists. *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971).

Mrs. Burney seeks to raise the issue in her brief of the statutory requirement of a fair hearing under 42 U.S.C. § 503(a)(3). While that provision was cited in Mrs. Burney's Complaint (App., p. 17), the issue was not decided by the District Court. It must be noted that the Secretary of Labor has treated this provision as calling for a post-determination hearing. 20 CFR Part 650. Thus, the validity of a federal regulation is being challenged. But the federal agency involved was not a party in the District Court and has taken no active part in this Court. This Court, then, should refuse to make an initial consideration of the claim.

The Brief of Appellee deals at some length with the supposed intent of Congress in enacting a system of unemployment compensation. These general statements of lofty purpose give a distorted view. Indeed, the statements tend to prove too much. The impression given is that the only requirements for payment of benefits are past covered employment and the fact of unemployment. The various requirements actually included in the Indiana law, which is typical, are set out above.

Congress was aware of such requirements when the program was enacted. Report No. 628, United States Senate Accompanying H.R. 7260, 74th Congress, 1st Session (Set out at Brief of Appellant, p. 14); See also Brief of Amici Curiae College/University Corporation et al. (employers' brief) pp. A9-A12. The Secretary of Labor is given authority, under 42 U.S.C. § 503 to refuse to approve state programs not complying with congressional intent, yet provisions such as that here under attack are found in almost

every state. See employers' brief, pp. A6-A8. The District of Columbia Unemployment Compensation Act, passed by that same Congress, contains similar provisions at §§ 46-310 and 46-311. It would certainly appear then that Congress has agreed with the concepts found in the Indiana law.

COMPLIANCE WITH THE DUE PROCESS REQUIREMENT

The constitutional issues remain to be considered. The Brief of Appellee deals at some length with the need of unemployed persons. Such need does not of itself create a constitutional right to relief. See *Board of Regents v. Roth*, supra. This Court there further stated:

> "Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning." 92 S.Ct. 2706.

and further:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in Goldberg v. Kelly [397 U.S. 254 (1970)], had a claim of entitlement to welfare benefits that was grounded in the statute defining eligibility for them." 92 S.Ct. at 2709.

It is the primary contention of the Division that the differences between the welfare program, involving continuing eligibility, and unemployment compensation, with its weekly determination of eligibility, makes *Goldberg* inapplicable.

The Brief of Appellee argues that similar requirements are placed on welfare recipients. Those requirements must be considered. It is first argued that welfare recipients undergo periodic eligibility reviews. That period, though, is every six months for AFDC and twelve months for other programs. That review, moreover, is not a condition precedent to continued payment of benefits.

> "The county department shall not discontinue assistance for the sole reason that the reinvestigation was not completed within the required period of time." *Indiana Public Assistance Manual,* XI-A-1.

Another duty is to inform the welfare department of any change of circumstances which might affect eligibility. This "duty" is a passive one indeed, not at all similar to those imposed on the claimant for unemployment compensation. No weekly reporting, or anything similar, is required.

The final duty is that part of the 1971 Amendments to the Social Security Act requiring certain welfare recipients to seek work or undergo job training. As of this date, no procedures have been instituted to enforce this obligation. Such an enforcement procedure might well be similar to that in this case, in which case *Goldberg* would no longer be applicable to that welfare program. Thus, the programs involved are substantially different.

No further discussion of the *Java* and *Torres* cases beyond that found in the Brief of Appellants is thought necessary. One further matter must be considered. That is the collection of statistics quoted at several points in the Brief of Appellee, both as to the statutory and due process arguments.

Two sets of statistics are used. One refers to the time necessary for a referee determination. Certainly, a speedy determination is desirable, but would hardly appear in itself to achieve the level of a constitutional requirement.

Moreover, these times vary from period to period, dependent upon work load, staff size and other factors. The statistics used by Mrs. Burney were taken from a period when the Division was understaffed. That situation has been remedied. Figures from the last four monthly reports show a quite different picture:

	Time Lapse—Filing to Decision			
	July, 1972	*August, 1972*	*September, 1972*	*October, 1972*
Total appeals	249	281	227	209
0-30 days	103	143	152	147
31-45 days	74	62	43	27
46-75 days	36	37	19	21
over 75 days	36	39	13	14

Temporary administrative difficulties within the Division would seem to be no reason for holding a statute unconstitutional, especially when those difficulties no longer exist. Of course, there can be no absolute certainty that the situation will continue to improve, but neither should serious deterioration be assumed.

Moreover, any constitutional question as to this would appear to be mooted by a change in the regulations of the Department of Labor which set time limitations to be read into 42 U.S.C. § 503. 20 CFR Part 650, published in 37 F.R. 16173.

The second group of statistics challenges the sufficiency of deputy determinations on the ground that close to 50 percent of appeals by claimants in the period of January-March 1972 resulted in reversal of the deputy determination. Other statistics not given, though, would show that in the same period over 40 percent of employer appeals from referees to the Review Board resulted in reversals. (Computed from monthly reports to the Department of Labor.)

Another weakness of the statistics is that they refer to all appeals, not only those on continued claims. No breakdown by both issue and result is given, but a breakdown by issues is available. During the period involved, approximately 77.5 percent of all appeals arose from determinations of issues arising from termination of the prior employment; about 12.5 percent involved continued-claim type issues; and about 10 percent could not be classified. The statistics, then, are not even relevant to the issue of this case. No showing of any constitutional deprivation appears.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Deputy Attorney General
Attorneys for Appellants